

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.D. BARNES ASSOCIATES, INC., a
Michigan corporation,

Plaintiff/Counter-Defendant,

vs.

Case No. 1:04-cv-850

Hon. Gordon J. Quist

GRAND HAVEN HIDEAWAY LIMITED
PARTNERSHIP, a Michigan limited
Partnership; CENTENNIAL MORTGAGE,
INC., a Missouri corporation; ALPHONSO
R. JACKSON, ACTING SECRETARY OF
HOUSING AND URBAN DEVELOPMENT,
a federal agency; ENGINEERED
HEATING & COOLING, INC., a Michigan
corporation; BOND CONSTRUCTION
COMPANY, a Michigan corporation; and
PYLMAN POWER, INC., an assumed
name of Fryling Electric, Inc., a Michigan
corporation; BRINKS MULTI-FAMILY
DRYWALL, INC., a Michigan corporation;
K AND L CONSTRUCTION, LLC, a
Michigan limited liability company;
WHIRLPOOL CORPORATION, a
Delaware corporation; PRECISE
PLUMBING & EXCAVATING, INC., a
Michigan corporation; PRIES SUPPLY
COMPANY, INC., a Michigan corporation;
FREDERICKS COMPANY, INC., a
Michigan corporation; ARMSTRONG
WOOD PRODUCTS, INC., a Texas
corporation d/b/a ARMSTRONG CABINET
PRODUCTS; STANDALE LUMBER &
HOME CENTER INTERIORS, a Michigan
corporation; SOLIS AND STRUCTURES,
INC., a Michigan corporation; JARED
TOLDO, an individual; M.J. BENZER
COMPANY, a Michigan corporation; and
QTC COMPANY, a Michigan corporation;
RICHARD F. GEORGE, an individual;
CAREY J. BOOTE, an individual,

Defendants/Cross-Plaintiffs,
and

STOCK BUILDING SUPPLY, LLC, a
Delaware limited liability company, and
PRECISE PLUMBING & EXCAVATING,
INC., a Michigan corporation, and BRINKS

**COUNTERCLAIM AND THIRD PARTY
COMPLAINT**

MULTI-FAMILY DRYWALL, LLC, a
Michigan limited liability company,
ARMSTRONG WOOD PRODUCTS, INC.,
a Texas corporation d/b/a ARMSTRONG
CABINET PRODUCTS,

Defendants/Cross/Counter/Third-
Party Plaintiffs,

vs.

JEDCO DELCON CORPORATION, CNA
SURETY CORPORATION, an Illinois
corporation, and NATIONAL FIRE
INSURANCE COMPANY OF HARTFORD,
a Connecticut corporation,

Third-Party Defendants,
and

WHIRLPOOL CORPORATION,

Defendant/Cross/Counter/Third
Party Plaintiff,

vs

NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD,

Third Party Defendant,
and

CHERRY VALLEY CONCRETE, INC., a
Michigan corporation,

Counter/Third-Party Plaintiff,

vs.

CNA SURETY CORPORATION, an Illinois
corporation, and NATIONAL FIRE
INSURANCE COMPANY OF HARTFORD,
a Connecticut corporation,

Third-Party Defendants.

Aileen M. Leipprandt (P44651)
Robert W. Parker (P31571)
Smith Haughey Rice & Roegge
Attorneys for Plaintiff
200 Calder Plaza Building
250 Monroe Ave., NW
Grand Rapids, MI 49503

John D. LaDue (P44100)
Boveri, Murphy, Rice, Ryan & LaDue
Attorneys for Defendant Centennial
Mortgage, Inc.
210 S. Michigan Street, Suite 400
South Bend, IN 46601
219-232-0300

616-774-8000

Michael C. Walton (P26121)
Rhoades McKee
Attorneys for Defendant Grand Haven
Hideaway Limited Partnership, QTC
Company and Carey J. Boote
600 Waters Building
161 Ottawa Ave., NW
Grand Rapids, MI 49503
616-235-3500

Scott R. Sewick (P54392)
Parmenter O'Toole
Attorneys for Defendant Engineered
Heating & Cooling, Inc.
175 West Apple Avenue
P.O. Box 786
Muskegon, MI 49443-0786
231-722-1621

Scott H. Hogan (P41921)
Tolley VandenBosch Korolewicz & Brengle,
PLC
Attorneys for Pylman Power, Inc. and
Cherry Valley Concrete, Inc.
1700 East Beltline, NE, Suite 200
Grand Rapids, MI 49525
616-447-1800

William C. Reens (P28225)
Pawlowski, Flakne & Reens PLC
Attorneys for Bond Construction Co.
300 Ottawa Ave., NW, Suite 650
Grand Rapids, MI 49503
616-458-7795

May, Simpson & Strote
Ronald P. Strote (P23333)
Attorneys for Stock Building Supply
100 West Long Lake Road, Suite 200
P.O. Box 1134
Bloomfield Hills, MI 48303-1134
248-646-9500

George E. Pawlowski (P18728)
Murray Pawlowski & Flakne, PLC
Attorneys for Defendant Standale Lumber
& Home Centers Interiors
300 Ottawa, NW, Suite 650
Grand Rapids, MI 49503
616-458-7795

Randall Allen White (P22261)
Attorney for Soils and Structures, Inc.
Scholten Fant, P.C.
100 North Third St.
P.O. Box 454
Grand Haven, MI 49417-0454
616-842-3030

Brianna T. Scott (P62170)
Williams, Hughes & Stapleton, P.C.
Attorneys for Brinks Multi-Family Drywall,
LLC
120 W. Apple Avenue
Muskegon, MI 49443-0599
231-726-4857

John R. Trentacosta (P31856)
Jason D. Menges (P64228)
Foley & Lardner LLP
Attorneys for Whirlpool Corporation
150 W. Jefferson Ave., Suite 1000
Detroit, MI 48226-4443
313-963-6200

MARGARET M. CHIARA
United States Attorney
by: Jennifer L. McManus, Assistant
United States Attorney, Western District of
Michigan
330 Ionia Ave., NW, P.O. Box 208
Grand Rapids, MI 49501-0208
616-456-2404

Curtis D. Rypma (P44421)
Schenk, Boncher & Rypma
Attorneys for Precise Plumbing &
Excavating
601 Three Mile Road, NW
Grand Rapids, MI 49544-1601

Thomas H. Thornhill (P24144)
Attorney for Defendant/Cross-Plaintiff
Richard F. George
300 Terrace St., P.O. Box 389
Muskegon, MI 49443-0389
231-725-8148

616-647-8277

Robert C. Timmons
Robert C. Timmons, P.C.
Attorneys for Pries Supply Company, Inc.
418 College Ave., NE
Grand Rapids, MI 49503
616-235-0180

Kotz, Sangster, Wysocki and Berg, P.C.
by: John T. Below (P48677)
Edward R. Boucher (P57251)
Attorneys for Defendant Armstrong Wood
Products, Inc.
400 Renaissance Center, Ste 2555
Detroit, Michigan 48243-1675
(313) 259-8300

Cherry Valley Concrete, Inc., by its attorneys, Tolley VandenBosch Korolewicz & Brengle, PLC, for its Counterclaim and Third Party Complaint, states as follows:

1. Cherry Valley Concrete, Inc. ("Cherry Valley") is a Michigan corporation with offices located at 5151 South Division, Grand Rapids, Michigan 49548.

2. Counterclaim Defendant, C.D. Barnes Associates, Inc. ("C.D. Barnes") is, upon information and belief, a Michigan corporation that does business in the State of Michigan.

3. Third Party Defendant, CNA Surety Corporation ("CNA"), is an Illinois corporation that does business in the State of Michigan.

4. Third Party Defendant, National Fire Insurance Company of Hartford ("National") is a Connecticut corporation that does business in the State of Michigan.

5. C.D. Barnes is the general contractor for a project known as the Hideaway at Lakeshore Apartments in Ottawa County, Michigan.

6. Cherry Valley performs concrete work.

7. In January of 2003, C.D. Barnes contracted with Cherry Valley for Cherry Valley to perform concrete work at the project. The total amount of the contract, with extras and changes, is Seven Hundred Forty-Four Thousand One Hundred Thirty-Two and 35/100 Dollars (\$744,132.35). C.D. Barnes agreed to pay Cherry Valley that amount for that work.

8. Cherry Valley performed its work on the project and otherwise performed all its obligations to C.D. Barnes under the contract.

9. C.D. Barnes paid Cherry Valley the sum of Five Hundred Ninety-Four Thousand Six Hundred Fifty Dollars and Sixty-Nine Cents (\$594,650.69) for the work performed by Cherry Valley on the project. C.D. Barnes owes to Cherry Valley the sum of One Hundred Forty-Nine Thousand Four Hundred Eighty-One Dollars and Sixty-Six Cents (\$149,481.66) under the contract.

10. C.D. Barnes has wrongfully and without justification failed to pay that sum to Cherry Valley.

11. C.D. Barnes has breached its contract with Cherry Valley because C.D. Barnes has not paid Cherry Valley in full for the work performed by Cherry Valley. As a result of the breach of contract by C.D. Barnes, Cherry Valley has suffered damages in the amount of One Hundred Forty-Nine Thousand Four Hundred Eighty-One Dollars and Sixty-Six Cents (\$149,481.66), plus interest, costs and attorney fees.

WHEREFORE, Cherry Valley requests judgment against C.D. Barnes in the amount of One Hundred Forty-Nine Thousand Four Hundred Eighty-One Dollars and Sixty-Six Cents (\$149,481.66) plus interest, costs and attorney fees, and Cherry Valley requests that such other and further relief as may be just and proper.

THIRD PARTY COMPLAINT

Cherry Valley realleges and incorporates by reference the allegations in the foregoing Counterclaim.

1. On or about October 22, 2002, C.D. Barnes and National entered into a Payment Bond (Reference No. 929251359) for Project No. 047-35206, Grand Haven Hideaway Apartments (Exhibit 1).

2. According to the Payment Bond, C.D. Barnes and National jointly and severally agreed that every claimant, who had "not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond

for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon.”

3. In April of 2004, Cherry Valley discontinued work on the project because it had not been paid properly.

4. As of the date Cherry Valley ceased working on the project, C.D. Barnes owed Cherry Valley the sum of One Hundred Forty-Nine Thousand Four Hundred Eighty-One Dollars and Sixty-Six Cents (\$149,481.66) for work that had been completed.

5. Cherry Valley has demanded payment from C.D. Barnes and from National/CNA, who have failed to pay the outstanding contract balance owed to Cherry Valley.

6. C.D. Barnes’ failure and refusal to pay all sums due under the contract is a material breach of the contract. National/CNA has also breached the Payment Bond because it has refused Cherry Valley’s demand for payment.

7. National/CNA assured and promised that Cherry Valley’s claim would be paid if C.D. Barnes failed to pay Cherry Valley. National/CNA has breached that promise.

8. National/CNA has not satisfied Cherry Valley’s valid claim for payment under the Payment Bond.

WHEREFORE, Cherry Valley requests this Court enter judgment in its favor against CNA and National, jointly and severally, in the amount of One Hundred Forty-Nine Thousand Four Hundred Eighty-One Dollars and Sixty-Six Cents (\$149,481.66), plus interest, costs and attorney fees, and Cherry Valley requests such other and further relief as may be just and proper.

TOLLEY, VANDEN BOSCH,
KOROLEWICZ & BRENGLE, PLC
Attorneys for Cherry Valley Concrete, Inc.

Dated: March 23, 2005

By: Scott H. Hogan /s/

Scott H. Hogan (P41921)
BUSINESS ADDRESS:
1700 E. Beltline, NE, Suite 200
Grand Rapids, MI 49525
Telephone: 616-447-1800

C:\docs\CHERRY VALLEY CONCRETE INC 1226\GRAND HAVEN HIDEAWAY\PLEADINGS\Counterclaim-Third Pty Comp.doc